Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

I979-I980 TERM

NO. 79-958

EDWARD PATRICK O'BRIEN,

Petitioner

vs

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

Opinion Below..... I

Jurisdiction..... I

Questions Presented..... I

Constitutional Provisions and Statutes..... I

Statement of the Case..... 2

Reason for Granting the Writ..... 7

THE COURT BY ITS ACTIONS DENIED THE PETITIONER HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY AN IMPARTIAL AND INFORMED JURY.

Conclusion..... I5

Appendix A..... Ia

Opinion and judgment of the United States Court of Appeals for the Eighth Circuit.

TABLE OF CASES, STATUTES, AND AUTHORITIES

CASES

Farkas v. United States, 2 F.2d 644 (6th Cir. I924) 9
Sandroff v. United States, I58 F.2d 623 (6th Cir. I946) 9
State v. Armento, 256 N.W. 2d 228 (Iowa I977) II
State v. Kent, 4 N.D. 577, 62 N.W. 63I (I895) II
State v. Thornburgh, 220 N.W. 2d 579 (Iowa I974) 9
State v. York, 2II N.W. 2d 3I4 (Iowa I973 8
United States v. Dickens, 4I7 F.2d 958 (8th Cir. I969) I0, I2
United States v. Mayer, 556 F.2d 245 (5th Cir. I977) I0
United States v. Pfeiffer, 539 F.2d 668 (8th Cir. I976) I0

STATUTES

Title I8 U.S.C. § 2 2
Title I8 U.S.C. § 23I2 2
Title I8 U.S.C. § 37I 2

AUTHORITIES

76 Am. Jur. 2d - Trials § I04I I2
Federal Rules of Criminal Procedure, Rule 24(c) I3

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EDWARD PATRICK O'BRIEN,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, Edward Patrick O'Brien, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding November 20, I979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not been published; it appears as Appendix A.

JURISDICTION

On the 20th day of November, I979, the United States Court of Appeals for the Eighth Circuit filed its opinion and judgment (see Appendix A). Petitioner did not file a request for rehearing, and has neither requested nor been granted an extension of time in which to file a Petition for Writ of Certiorari. Jurisdiction of this Court is invoked under Title 28 U.S.C. §I254(I).

QUESTIONS PRESENTED

May the Court, on its own motion, exclude evidence on reading of a transcript to a jury at its request, when that evidence had been previously admitted without objection by the United States Attorney?

May the Court order the return of a verdict after one juror had insisted he was unable to reach a verdict?

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves:

U.S. Const. amend. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1254(1). Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

. . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Federal Rules of Criminal Procedure, Rule 24(c). ALTERNATE JURORS. The Court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . .

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Southern District of Iowa on two counts of violation of Title 18 U.S.C. §§2312, 2 (Interstate Transportation of Stolen Motor Vehicle; Aid and Abet) and Title 18 U.S.C. §371 (Conspiracy), and was sentenced to serve two concurrent four-year terms of impri-

sonment. The case was appealed to the Eighth Circuit Court of Appeals, and affirmed. The opinion has not been published; it appears in Appendix A.

The events during trial and deliberations of Edward Patrick O'Brien are as follows:

On March 9, I979, the Petitioner was arraigned and entered a plea of not guilty, which plea was accepted by the Honorable Ronald E. Longstaff, United States Magistrate. The case was ultimately brought to trial on June I8, I979. On the afternoon of the first day of the trial, the United States Attorney began the presentation of evidence, and the jury was ultimately instructed on June 2I, I979. The jury returned its verdict of guilty on two counts late June 22, I979. On July I8, I979, the Petitioner was adjudged guilty on two counts of the indictment and sentenced to serve two four-year terms, the sentences to run concurrently. Notice of Appeal was filed July 27, I979.

Since the Petitioner's appeal was based on a series of events which occurred during jury deliberations, the following Time Table was assembled to clarify those events in relation to each other, with the approximate time each occurred.

TIME TABLE

June 2I, I979

8:58 p.m. Jury notifies Court it has arrived at a stalemate.

9:24 p.m. Jury requests testimony transcript.

I0:30 p.m. Jury request re-reading of testimony.

Petitioner objects to re-reading.

June 22, I979

9:29 a.m. U.S. and Petitioner request jury be admonished without re-reading of testimony.

9:38 a.m. Jury continues deliberations.

3:I7 p.m. Juror asks to be removed.

3:44 p.m. Jury reports continuing stalemate.

U.S. requests re-reading of testimony.

Petitioner moves for mistrial on juror request for removal.

Petitioner objects to re-reading.

Disagreement on Allen charge.

4:3I p.m. Agreement to read testimony.

4:50 p.m. Discussion on editing testimony.

5:00 p.m.- 7:53 p.m. Transcript read; jury returns to deliberations.

8:00 p.m. Juror repeats request to be removed; Petitioner moves for mistrial.

I0:33 p.m. Petitioner moves for mistrial due to coercive effect of late hour.

II:00 p.m. Jury asks to continue.

II:55 p.m. Jury returns verdict.

Shortly after it began deliberating, the jury notified the Court it had arrived at a stalemate, and the Petitioner moved for a mistrial on grounds that an order to continue deliberations would be coercing a verdict. The motion was denied. Approximately one-half hour later, the jury requested a transcript of the testimony of Government witness Arthur William Schlotzhauer, and witness James Allan LoHoff, and an hour later requested, in the alternative, that the testimony be read to them. The Petitioner objected, arguing that such a reading would be a resuscitation of the earlier testimony, and would give it undue emphasis.

The alternatives of a simple admonition and

an "Allen" charge were discussed, resulting in an agreement that an "Allen" charge would be premature, and the jury was sent back to its deliberations.

Some six hours later, the jury reported being still at a stalemate. At this time, the United States Attorney requested a re-reading of testimony, and the Petitioner objected, on the same grounds earlier urged. The possibility of an "Allen" charge was again discussed, to no resolution. Instead, the parties arrived at a compromise regarding re-reading of testimony, which would allow the jury to hear the portion of transcript requested, plus cross-examination of those witnesses, and the Petitioner's entire testimony.

Following a brief recess, the Court announced that it had determined certain portions of witness Schlotzhauer's testimony on cross-examination had been inadmissible and the United States Attorney should have objected. Over the strenous objection of the Petitioner, the Court ordered the supposedly objectionable material edited from the re-reading. The transcript was read as edited, and the jury returned to deliberating.

Shortly before the jury's second report of stalemate, one juror sent a note to the Court requesting that he be removed, stating:

> I, Charles Beidler, would like to ask the Court to be removed from the jury,

due to the fact that my decision would not be fair to the U.S. people or to the defendant.

Petitioner moved for a mistrial, arguing that under these circumstances, a unanimous verdict was impossible. The motion was denied.

Following the re-reading of the testimony, the juror inquired again about being removed from the jury and the Petitioner again moved for a mistrial.

Finally, Petitioner moved again for a mistrial, noting the earlier deadlocks, the lengthy deliberations, the one juror's inability to reach a verdict, and the lateness of the hour.

REASON FOR GRANTING THE WRIT

THE COURT BY ITS ACTIONS DENIED THE PETITIONER HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY AN IMPARTIAL AND INFORMED JURY.

During cross-examination of Government witness Schlotzhauer, the Petitioner inquired into the witness' motivation for testifying. He first elicited the information that Schlotzhauer, although a participant in the crimes with which the Petitioner was charged, was not going to be prosecuted for his actions. He next showed the wit-

ness, if prosecuted, understood he could be charged with a number of offenses, totalling a lengthy potential term in prison. He also asked the witness what his role was in the charged crimes. On re-reading, the Court ordered that the questions regarding penalties on conviction if charged be expunged.

In preparing the jury for the re-reading, the Court stated:

> The court is now going to have read to you all of the testimony of Mr. Schlotzhauer, both direct examination and cross-examination, because the court believes that it's impossible for the court or anyone else to read a portion of that and be fair. It may be that we wouldn't read all of what he said about a certain thing.
> So in fairness, we're going to read all of Schlotzhauer's testimony. . .
> We feel that in fairness it will all be read.
>
> (Emphasis added.)

The first element of the alleged error is whether the Court could have excluded this evidence in the first instance. It has been generally held that the Court has the power to exclude evidence, but not, ordinarily, in the absence of objections, State v. York, 2II N.W. 2d 3I4 (Iowa I973). The interposition by the Court of its own

objection is good only in the case where the evidence could properly be excluded, State v. Thornburgh, 220 N.W. 2d 579 (Iowa I974).

No objection was made to the evidence the Court excluded. Nor, at the time, did the Court itself interpose any objection. The Court cannot now, after the evidence has been before the jury for several days, take it upon itself to exclude that evidence on re-reading of testimony, any more than it could send word to the deliberating jury to disregard it.

Assuming, arguendo, that the Court had the power to exclude evidence at the point of a jury-requested re-reading of testimony, the question then is whether this evidence could have been excluded when the questions were first asked. The answer is clear: no, it could not.

The Federal Courts have consistently held that the Defendant is entitled to examine thoroughly a witness' motivation for testifying. See, e.g.: Farkas v. United States, 2 F.2d 644 (6th Cir. I924): Where the verdict depends on the credibility of the witness, his motive for testifying, showing bias, is relevant; promises or hopes of immunity from prosecution are admissible as affecting the witness' credibility. Sandroff v. United States, I58 F.2d 623 (6th Cir. I946): In a conspiracy prosecution, the Court committed reversible error in shutting off cross-examination of the Defendant's co-conspirator

on the question of promised or expected immunity, and in refusing to permit his cross-examination on why he and his son, though named as co-conspirators, had not been included in the defendant's indictment. United States v. Dickens, 417 F.2d 958 (8th Cir. 1969): Where the testimony of an accomplice is critical, it becomes necessary to attack the witness' veracity and credibility, which can be done only by a searching and wide ranging cross-examination; while the scope and extent of cross-examination is within the sound discretion of the trial court, wide lattitude is crucial when the testimony of an accomplice is involved (emphasis added). United States v. Pfeiffer, 539 F.2d 668, 672 (8th Cir. 1976): It is essential, when the witness' credibility is critical to the Government's case, that defense counsel be given maximum opportunity to test that credibility by exploring the witness' motivation for testifying (emphasis added). And United States v. Mayer, 556 F.2d 245,248-249 (5th Cir. 1977): A defendant's right to cross-examine fully the witnesses against him is one of constitutional dimensions, secured to federal defendants under the confrontation clause of the Sixth Amendment, and the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination; this is especially true where a prosecution witness has had prior dealings with the prosecution or with other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the

prosecution in exchange for the prosecutor's actions in having some or all of the charges against the witness dropped.

In overruling Petitioner's objection, the Court stated it was not the jury's prerogative to know the penalty for the charged offense, or "at least what Mr. Kutmus believes the penalty to be." Petitioner countered, arguing that the only question was what the witness thought the penalty was, and that it was immaterial whether that was in fact the penalty. The Court rejected this argument.

The basic tenor of the above cited cases is that the jury is entitled to know whether the witness' testimony may be influenced by an expectation of leniency or immunity. All of these cases however, are rooted in the case of State v. Kent, 4 N.D. 577, 62 N.W. 631, 639 (1895), where the Court reversed a Trial Court ruling excluding defense counsel's inquiry of an admitted accomplice whether he expected to be hung, and held that it is proper to inquire of the accomplice-witness what penalty he anticipates, as this shows the degree of his motive for self-preservation, and hence his level of credibility.

The same principle was applied in State v. Armento, 256 N.W. 2d 228 (Iowa 1977), which was brought to the Trial Court's attention during Petitioner's arguments on his objection to the exclusion. The Iowa Supreme Court in Armento

first generally held that the defendant should be allowed wide lattitude in seeking to show the bias of an alleged accomplice in testifying for the prosecution. It then ruled that in the specific instance, the witness should have been allowed to testify to what he thought might be a charge, since the jury's knowledge of what the witness thought the penalty was would better enable the jury to assess the witness' testimony.

Finally, this Court has held that the Trial Court's discretion in limiting cross-examination only comes into play once the defendant has substantially and thoroughly exercised the right of cross-examination. Dickens, supra, at 96I. Here, the Petitioner's inquiry was two-pronged: first, on examination of the general immunity question, and second, the specifics from which the witness expected to be immune.

It is generally accepted that, absent a statute or circumstances requiring denial of the request, the interests of justice are better served by allowing the jury to rehear testimony, 76 Am. Jur. 2d - Trial §I04I. In this instance, the Court made it abundantly clear to the jury that fairness demanded they hear all the testimony of the witnesses, whose partial testimony they had requested. The Court then proceeded to have read an edited version. This cannot have escaped the notice of the entire panel, yet the omission was unexplained, and the Court's words indicated it had not even occurred. At least

part of the panel had to have been affected by the change, which clearly prejudiced the Defendant's chances for a properly deliberated verdict.

The evidence adduced was clearly admissible when first given; it would have been error to exclude it either on the prosecution's motion, or the Court's own motion. Nor, once admitted into evidence, could the Court at some later time reconsider that admission and attempt to withdraw it from the jury's consideration, especially having made a great point that the jury was being re-read the entire testimony. Such actions constituted error on the part of the Trial Court, denying the Petitioner a fair trial.

Shortly before the jury's second report of stalemate, a member of the panel requested to be removed. He repeated that request immediately following the re-reading of testimony. On both occasions, Petitioner moved for mistrial, contending that it was clear that no verdict could possibly be delivered under these circumstances, without violating the Petitioner's rights by coercing a verdict. At the time of the second request, the jury had been deliberating for approximately thirty-two hours, less time for meals and rest.

The Federal Rules of Criminal Procedure, Rule 24(c), contemplates the occasion of a juror requesting removal prior to the beginning of deliberations, and replacing that juror with an alter-

nate. No similar provision exists for the problem if it arises after deliberations have begun. The fact of the Rule, to be applied to problems arising before deliberations begin, obviously contemplates the possibility of a juror finding during the course of trial that he is unable to sit in judgment on the case. The absence of a correlative provision to be applied when the problem arises during deliberations leaves only two options available to the Court: declare a mistrial, or deliver an "Allen" charge. A circumstance such as in this case, where the hour was late, the jury had already had to spend a night in a hotel, and apparently only one person was preventing the entry of a verdict, lends itself more to the implication of compromise of conscience. At such a point in the deliberations, when the jury was at a stalemate and one juror repeatedly requested to be removed rather than do an injustice, the only proper choice the Court could make was to declare a mistrial.

Failure to do so was clear error.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Clark Holmes

CLARK HOLMES

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-I635

United States of America, Appellee,	*	Appeal from the United States District Court for the Southern District of Iowa
v.	*	
Edward Patrick O'Brien, Appellant.	*	

Submitted: November 8, I979

Filed: November 20, I979

Before GIBSON, Chief Judge, ROSS and STEPHENSON, Circuit Judges.

PER CURIAM.

Appellant was convicted on Count IX (substantive count) and Count XIV (conspiracy count) of a fourteen-count indictment charging the

interstate transportation of motor vehicles, knowing them to be stolen, in violation of I8 U.S.C. §§23I2, 2 and 37I[1]. This appeal is limited to claims of trial court error in refusing to read to the jury during its deliberations all of the cross-examination of the witness Schlotzhauer, and further error in connection with the trial court's refusal to grant a mistrial when one juror, after deliberations had begun, requested to be removed from the jury panel "due to the fact that my decision would not be fair to the U.S. people or to the defendant." We affirm.

After approximately five and one-half hours of deliberation, the jury delivered a note to the court indicating it had reached a stalemate. The matter was discussed in chambers with counsel. Defendant's counsel's motion for a mistrial on the grounds that to continue deliberations would be coercing a verdict was denied. The jury was then brought into the courtroom, at which point the foreman requested a transcript of the testimony of two government witnesses, Schlotzhauer and LoHoff. Later it was alternatively requested that the testimony be read to the jury. Defense counsel, out of the presence of the jury, objected to a reading of the testimony. The court advised the jury that the request would be consider-

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[1]The Honorable Donald E. O'Brien, United States District Judge for the Northern and Southern District of Iowa, presiding, imposed concurrent sentences of four years of imprisonment.

ed and suggested the jury should consider retiring for the evening, which it did.

The next morning, in a conference with the court, counsel agreed that the transcript of testimony should not be read at that time and the court should admonish the jury to continue its deliberations. This was done.

That afternoon the court received two notes. One, from a juror, stated:

> I, Charles Beidler, would like to ask the Court to be removed from the jury, due to the fact that my decision would not be fair to the U.S. people or to the defendant.

The second note, which was from the foreman, indicated the jury remained at a stalemate.

In chambers defendant moved for a mistrial based on juror Beidler's note, which motion was denied. Defendant again objected to the reading of the transcript but, without waiving his earlier objections, agreed to an Allen charge. The government objected to an Allen charge and recommended that the transcript of the testimony be read to the jury.

The parties arrived at a compromise regarding the reading of the testimony which would allow the jury to hear the portion of the testimony requested, plus cross-examination and the defendant's

entire testimony. Thereafter the court announced that the testimony would be read as agreed, except that a short passage of the cross-examination of the witness Schlotzhauer regarding the maximum sentence for interstate transportation of a stolen motor vehicle would be omitted for the reason "that it is not the jury's prerogative to know that five years for each count of interstate transportation of a motor vehicle is, in fact, at least what Mr. Kutmus believes the penalty to be."[2] The defendant strenously objected to the reading with the objectionable material omitted.

The reading of the testimony to the jury, including breaks, took approximately three hours. Following the reading, juror Beidler inquired

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2The pertinent testimony read to the jury--questions by defense attorney Kutmus and answers of witness Schlotzhauer--is set out below. The omitted testimony is underscored.

Q. How many charges could they file against you a hundred?

A. Probably.

Q. Do you know what the punishment is?

A. Yes.

Q. What did they tell you?

through the marshal to the court as to when he (Beidler) would get an answer to his note. The court did not respond to Beidler's note. Defendant again moved for a mistrial, noting the earlier reports of deadlocks, the lengthy deliberations, the one juror's inability to reach a verdict, and the lateness of the hour. At II:55 p.m. the jury

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A. Probably put me in jail and put the key away and send my mail to a groundhog.

Q. Did they tell you that a stolen vehicle in interstate commerce is five years each count?

A. Yeah.

Q. Could you have gone, technically, to perhaps 500 years in prison?

A. Probably.

Q. Is that motivating you to testify today?

A. That had nothing to do with testifying today.

Q. How about last week or whenever, the threat of 500 years doesn't bother you?

A. No, it doesn't bother me.

returned its verdict of guilty on the two counts. Defense counsel then polled the jury, and each of the jurors, including Beidler, stated that it was his verdict.

We are not persuaded that the trial court abused its discretion in refusing to highlight by reading to the jury the testimony as to the maximum penalty for the crime with which the defendant was charged. The matter of assessing penalty is exclusively within the province of the court, and the jury's sole purpose is to determine the facts and thereby the guilt or innocence of the defendant. United States v. Wilson, 506 F.2d 52I, 522 (9th Cir. I974); United States v. Johnson, 502 F.2d I373, I377-78 (7th Cir. I974), cert. denied, 420 U.S. 977 (I975); United States v. Ramantanin, 452 F.2d 670,672 (4th Cir. I97I); United States v. Del Toro, 426 F.2d I8I, I84 (5th Cir.), cert. denied, 400 U.S. 829 (I970). To emphasize the penalty tends to draw the attention of the jury away from their chief function as sole judges of the facts, to open the door to compromise verdicts, and to confuse the issues to be decided. Del Toro, supra. See I Devitt & Blackmar, Federal Jury Practice and Instructions § I8.02 (3d ed. I970).

Furthermore, the cross-examination of witness Schlotzhauer had been thorough and searching. The omission from the reading to the jury of that portion of testimony of the brief reference to the penalty involved was clearly within the

discretion of the trial court. United States v. Headid, 565 F.2d I029, I03I (8th Cir. I977); see also United States v. King, 552 F.2d 833, 849-50 (9thCir. I976), cert. denied, 430 U.S. 966 (I977).

Appellant's final contention is that the court erred in not granting a mistrial in view of juror Beidler's request that he be removed from the jury because his decision "would not be fair to the U.S. people or to the defendant." We disagree. It is our view that under the circumstances the court's patience in allowing the jury to continue its deliberations without comment was a proper exercise of discretion.[3] It is not uncommon for jurors to become frustrated during the course of their deliberations. They have a difficult task. Patience and understanding on the part of the trial court is often helpful. In this case the trial court's decision was the most reasonable alternative. The jury returned its verdict less than three hours after the juror's inquiry as to when he would get an answer to his note requesting

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3Cf. United States v. Weiner, 578 F.2d 757, 764-65 (9th Cir.), cert. denied, 439 U.S. 98I (I978) (court gave a modified Allen instruction); United States v. Dozier, 522 F.2d 224, 227-28 (2d Cir.), cert. denied 423 U.S. I02I (I975) (jury was instructed to continue its deliberations); I Devitt & Blackmar, Federal Jury Practice and Instructions § I8.I4 (3d. ed. I970).

release as a juror. The jurors, including Beidler, were individually polled, and each juror affirmed the verdict without reservation.

Affirmed.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.